Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1975

NO. 76-294

JOHN R. JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, for the Fifth Circuit

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MIAMI REVIEW — 371-4853 — 377-3721

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The Petitioner, John R. Jones, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 23, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Fifth Circuit was entered June 23, 1976. This Petition for Writ of Certiorari was filed within 90 days of such entry of judgment.

QUESTION PRESENTED

HAS THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, REQUIRED A LOWER DUTY OF CARE THAN IS TO BE LEGALLY CONSTRUED FROM THE DECISIONS REQUIRING ORDINARY CARE IN THE PROTECTION OF A PRISONER FROM INJURIES INFLICTED BY A FELLOW PRISONER, AND THEREFORE, HELD THE PETITIONER TO A HIGHER STANDARD OF PROOF IN DEMONSTRATING THAT THE BUREAU OF PRISONS FAILED TO EXERCISE ORDINARY CARE IN THE PROTECTION OF PETITIONER FROM INJURIES INFLICTED BY A FELLOW PRISONER, THEREFORE BREACHING ITS DUTY UNDER 18 U.S.C. § 4042?

STATUTORY PROVISION INVOLVED

18 U.S.C. § 4042

DUTIES OF BUREAU OF PRISONS

The Bureau of Prisons, under the Direction of the Attorney General, shall—

(1) Have charge of the management and regulation of all federal penal and correctional institutions;

(2) Provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) Provide for the protection, instruction and discipline of persons charged with or convicted of offenses against the United States. . . .

STATEMENT OF THE CASE

On October 19, 1973, Appellant/Petitioner, JOHN R. JONES, was an inmate in the United States Penitentiary at Atlanta, Georgia, and assigned to the Honors Dormitory, specifically Dorm D-3, Room 18.

Inmates assigned to the Honors Dormitory, a minimum security facility, are required to meet requirements demonstrating that they are able to function without maxi-

mum supervision. At approximately 7:00 o'clock to 7:15 a.m. on October 19, 1973, John R. Jones was assaulted while he slept in his bed and received a severe laceration which required substantial medical treatment, and ultimately resulted in a permanent scar. The prison dormitory in which Petitioner was confined for living purposes was under the supervision of Assistant Warden of Controls. Under his supervision a guard was normally present in the officers room of D-3 on the 8:00 o'clock a.m. to 4:00 p.m. shift and on the 4:00 p.m. to midnight shift; however, no guards were normally posted in the office on the midnight to 8:00 o'clock a.m. shift.

The guard on the midnight to 8:00 a.m. shift would normally make three bed checks which would all be prior to 6:20 a.m. and only on very few occasions would the guard make an unscheduled round. Only one officer was assigned patrol duty over the Honor Dormitories D and E and several yard areas.

At 6:20 a.m. on October 19, 1973, the prison area for both maximum, medium and minimum personnel were open for the purpose of their going to and coming from breakfast. During the hours of 6:20 a.m. to 8:00 o'clock a.m. the outside door to Dormitory D was unlocked.

Due to the improper exercise of ordinary care to protect John R. Jones from an unwarranted assault he sustained the injury referred to hereinabove.

Petitioner filed his complaint in the United States District Court for the Southern District of Florida on May 14, 1975, seeking relief against the United States of America under the Federal Tort Claims Act for breach of the

duty of care owed to Petitioner while he was incarcerated in the United States Penitentiary in Atlanta, Georgia.

The United States of America filed its answer to the aforementioned complaint in the trial court on July 16, 1975, generally denying that it had breached its duty of care to the petitioner. A non-jury trial was held before the court on November 17, 1975. Upon completion of the trial the court entered final judgment for the defendant, a copy of which is set forth in the Appendix hereto.

The court further entered findings of fact and conclusions of law on December 3, 1975, a copy of which is set forth in the Appendix hereto.

Appellant/Petitioner filed his Notice of Appeal on December 18, 1975, and on June 23, 1976, the appeals court affirmed the trial court's decision, with the opinion set forth in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

I.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court in *United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963), held that federal prisoners may sue the Government under the Federal Tort Claims Act. Inferior courts in various decisions have inter-

preted the Bureau of Prisons under 18 U.S.C. § 4042 to provide for the safekeeping and protection of inmates. These cases including *Bourgeois v. United States*, 375 F.Supp. 133 (N.D. Tex., 1974), *Cohen v. United States*, 252 F.Supp. 679 (N.D. Ga., Atl. Div., 1966), *Fleishour v. United States*, 244 F.Supp. 762 (N.D. E.D. Ill., 1965), *Johnson v. United States*, 258 F.Supp. 372 E.D. Va., 1966), *Williams v. United States*, 384 F.Supp. 579 (D.C. D.C., 1974), and the decision of the United States Circuit Court, Fifth Circuit, in this cause state that it is the duty "to exercise ordinary care for the prisoner's protection and to keep him safe and free from harm", *Cohen, supra*, 252 F.Supp. at 687.

These cases seem to require that the prison officials have some sort of prior knowledge of the dangerous propensity of a specific prisoner and then fail to supervise that specific prisoner properly in order to create any liability on behalf of the Bureau of Prisons. This seems patently against the intent of 18 U.S.C. § 4042.

All of the cases cited above show that certain inmates through no fault of their own are made to suffer a far more severe sentence than that originally contemplated or imposed by the trial judge in their respective criminal cases.

The standard of ordinary care show go beyond requiring the Bureau of Prisons to supervise those prisoners which show particular traits for violence and this Court should require a minimum standard of care governing the conduct of the Bureau of Prisons in supervising all personnel.

It is clear from the facts of this case along with others cited above that such a standard would not only have acted as a deterent to the injuries sustained, but also would have prevented the injury suffered by the Petitioner in this cause.

CONCLUSION

For the aforementioned reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF
MAX P. ENGEL
Attorneys for Petitioner
1461 N.W. 17th Avenue
Miami, Florida

BY s/ Max P. Engel

MAX P. ENGEL, ESQ.

CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari was mailed to Solicitor General's Office, Washington, D.C., the United States Attorney's Office, 300 Ainsley Building, Miami, Florida, this 23 day of August, 1976.

/s/ Max P. Engel

OF COUNSEL

APPENDIX

in the

Supreme Court

of the

United States

OCTOBER TERM 1975

NO. _____

JOHN R. JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 75-808-CIV-PF

JOHN R. JONES,
Plaintiff,
vs.

UNITED STATES OF AMERICA,
Defendant.

(Filed Nov. 18, 1975)

FINAL JUDGMENT

THIS CAUSE came on for trial before the Court, without a jury, and the Court having considered the evidence and heard the arguments of counsel, it is —

ORDERED AND ADJUDGED that Final Judgment be, and the same is, hereby entered in favor of the defendant, UNITED STATES OF AMERICA, and against the plaintiff, JOHN R. JONES. Costs in this action will be taxed at a later date upon appropriate Bill of Costs.

DONE AND ORDERED at Miami, Florida this 18th day of November, 1975.

/s/ Peter Fay
UNITED STATES DISTRICT JUDGE

cc:
Martin M. Dernis, Esquire
U.S. Attorney [AUSA Berk]

[TITLE OMITTED]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. On or about October 19, 1973, the plaintiff, John R. Jones was housed in the honors dormitory known as D-3 at the Federal Penitentiary in Atlanta, Georgia.

2. On or about October 19, 1973, plaintiff was assaulted by an unknown assailant and suffered an injury which left a scar of approximately four inches on his left cheek.

3. The prison authorities were not on notice of any real possibility or probability of physical danger to the plaintiff in the honors dormitory during the hours in which the assault occurred.

4. The defendant, through the Bureau of Prisons, breached no duty of care toward the plaintiff.

CONCLUSIONS OF LAW

1. The duty of care owed by defendant, through the Bureau of Prisons, is provided by 18 USC § 4042, and requires the exercise of ordinary diligence to keep prisoners safe and free from harm.

2. The defendant was not negligent toward the plaintiff inasmuch as the prison officials were not on notice of any real possibility or probability of physical danger to the plaintiff in the honors dormitory to which he was assigned during the hours in which he was assaulted.

3. The defendant is entitled to judgment in its favor, together with the costs of the action.

DONE AND ORDERED at Miami, Florida, this ____ day of _____, 1975.

UNITED STATES
DISTRCIT JUDGE

cc: U.S. Attorney (Berk)
Martin M. Dernis, Esq.

United States Court of Appeals,
Fifth Circuit.

No. 76-1044
Summary Calendar.*

John R. JONES, Plaintiff-Appellant,
v.

UNITED STATES of America,
Defendant-Appellee.

June 23, 1976.

Former prisoner sought damages against United States under Federal Tort Claims Act for injuries received while he was incarcerated. The United States District Court for the Southern District of Florida, Peter T. Fay, J., entered judgment for United States, and former prisoner appealed. The Court of Appeals, Roney, Circuit Judge, held that the United States was not liable for injury received by prisoner in honors dormitory from an unknown assailant, where prisoner, who had received a minimum custody classification, upon his own request was assigned to honors dormitory with limited supervision, at no time prior to assault had personnel been advised of any problems existing between prisoner and another inmate, prisoner had not requested special protection or segregation from general inmate population, on night of attack there had been no extraordinary incidents, there was no apparent group tension and no other problems had been observed by correctional staff.

Affirmed.

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. Prisons—17

The United States, through the bureau of prisons, is required to exercise ordinary diligence to keep prisoners safe and free from harm. 18 U.S.C.A. § 4042.

2. Convicts—2

The United States government is not an insurer of the safety of a prisoner; thus, in order to recover, a plaintiff must show that the government was negligent in the exercise of its responsibilities. 18 U.S.C.A. § 4042.

3. Prisons—13

Prison officials must have broad discretion, free from judicial intervention in classifying prisoners in terms of their custodial status.

4. Convicts—2

The United States was not liable for injury received by prisoner in honors dormitory from an unknown assailant, where prisoner, who had received minimum custody classification, upon his own request was assigned to honors dormitory with limited supervision, at no time prior to assault had personnel been advised of any problems between prisoner and another inmate, prisoner had not requested special protection or segregation from general inmate population, on night of attack there had been no extraordinary incidents, there was no apparent group tension and no other problems had been observed by correctional staff. 18 U.S.C.A. § 4202; 28 U.S.C.A. §§ 1346(b), 2674.

Appeal from the United States District Court for the Southern District of Florida.

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

John R. Jones sought damages against the United States of America under the Federal Tort Claims Act, 28 U.S.C.A. §§ 1346(b), 2674, for injuries received while he was incarcerated in the United States Penitentiary in Georgia. At a nonjury trial, the district court found no breach of the duty of care owed to plaintiff by the defendant, through the Bureau of Prisons, as provided in 18 U.S.C.A. § 4042, and entered a judgment for defendant. We affirm.

Plaintiff was housed in the Honors Dormitory at the federal penitentiary in Atlanta, Georgia. In October 1973, plaintiff was assaulted by an unknown assailant and suffered an injury which left a permanent scar on the left side of his face. The district court found that the prison authorities were not on notice of the real possibility or probability of physical danger to the plaintiff in the Honors Dormitory during the hours in which the assault occurred.

[1, 2] The duty of care owed by defendant, through the Bureau of Prisons, is provided by 18 U.S.C.A. § 4042, and requires the exercise of ordinary diligence to keep prisoners safe and free from harm. The Government is not an insurer of the safety of a prisoner. Muniz v. United States, 280 F.Supp. 542 (S.D.N.Y.1968); Fleishour v. United States, 244 F.Supp. 762 (N.D.Ill.1965), aff'd on

different grounds, 365 F.2d 126 (7th Cir.), cert. denied, 385 U.S. 987, 87 S.Ct. 597, 17 L.Ed.2d 448 (1966). In order to recover, a plaintiff must show that the Government was negligent in the exercise of its responsibilities. Williams v. United States, 384 F.Supp. 579 (D.D.C.1974); Johnson v. United States, 258 F.Supp. 372 (E.D.Va.1966).

[3] Since the Supreme Court's decision in United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963), which held that federal prisoners may sue the Government under the Federal Tort Claims Act, courts have uniformly held that prison officials must have broad discretion, free from judicial intervention, in classifying prisoners in terms of their custodial status. See 60 Am. Jur.2d Penal and Correctional Institutions § 23 (1972); Annot., 41 A.L.R.3d 1021 (1972).

[4] In the instant case, Jones received a minimum custody classification, and upon his own request was assigned to the Honors Dormitory where he and other inmates could function without constant supervision and without restriction, except for periodic checks. At no time prior to the assault had the personnel in Atlanta been advised directly or indirectly of any problems existing between Jones and another inmate. Jones had not requested special protection or segregation from the general inmate population. On the night of the attack, there had been no extraordinary incidents in the institution. There was no apparent group tension and no other problems had been observed by the correctional staff.

There is no evidence in this case upon which plaintiff could ground a claim under Cohen v. United States, 252 F.Supp. 679 (N.D.Ga.1966), rev'd on other grounds, 389

F.2d 689 (5th Cir. 1967), upon which he relies. In Cohen an inmate previously diagnosed by prison psychiatrists as being psychotic, psychopathic and paranoid, who had been placed in maximum segregation, having been classified as "unmanageable or dangerous," escaped and attacked inmate Cohen during his period of escape. The court allowed recovery finding that the Government was negligent in regard to its supervision of the assailant inmate, and thus breached its duty to Cohen "to exercise ordinary care for the prisoner's protection and to keep him safe and free from harm." 252 F.Supp. at 687.

On the record in this case, we find no error in the district court's determination that the defendant was not negligent toward plaintiff and did not breach the duty of care required by law.

AFFIRMED.

Supreme Court, U. S.
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No. 76-294

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN R. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-294

JOHN R. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, an inmate in the United States Penitentiary in Atlanta, Georgia, was attacked and injured by an unknown inmate. He brought suit against the United States in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act, alleging that his jailers had breached their duty of care towards him by allowing the attack to occur.

The district court, after trial, held that the government had not been negligent, finding that petitioner had made no showing that the prison guards were "on notice of any real possibility or probability of physical danger to [petitioner] * * * " (Pet. App. 2). The court of appeals affirmed in an opinion on which we rely (Pet. App. 4-8).

Petitioner contends (Pet. 6-7) that government jailers should be held accountable for injuries to prisoners

regardless of whether they were aware of potential violence. The court of appeals correctly held (Pet. App. 6), however, that "[t]he government is not an insurer of the safety of a prisoner," but rather must meet a standard of ordinary care. *Fleishour* v. *United States*, 244 F. Supp. 762 (N.D. Ill.); *Muniz* v. *United States*, 280 F. Supp. 542 (S.D. N.Y.); *Williams* v. *United States*, 384 F. Supp. 579 (D. D.C.).[1] The court pointed out (Pet. App. 7) that the prison officials in this case had no notice that petitioner was in danger or that a potentially hazardous situation existed. The court therefore agreed with the district court that no negligence on the part of the government had been established. These rulings were correct and do not merit further review.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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[1]This Court has explicitly repudiated "absolute liability" as a basis for recovery of damages under the Federal Tort Claims Act. *Dalehite* v. *United States*, 346 U.S. 15, 45.